

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

DEC -9 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0237-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JERALD E. LEE,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR20091554001 and CR20093213001

Honorable John S. Leonardo, Judge

REVIEW GRANTED; RELIEF GRANTED IN PART

Jerald Lee

Buckeye
In Propria Persona

K E L L Y, Judge.

¶1 Jerald Lee petitions this court for review of the trial court's denial of his of-right petitions for post-conviction relief brought pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb those rulings unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 In 2009, Lee pled guilty to two counts of theft of a means of transportation in two cause numbers. At the change-of-plea hearing, upon Lee's motion, the trial court set sentencing for ninety days later to allow Lee to be transported to Maricopa County to appear in a pending criminal matter there. The court stated Lee should be transported to Maricopa County after completing his interview with the probation department concerning the presentence report. The presentence interview, however, did not occur until five days before Lee's scheduled sentencing and Lee was not transported to Maricopa County. At sentencing, Lee moved to continue his sentencing for that reason. The court denied the motion and sentenced Lee to concurrent, aggravated, seven-year prison terms for each offense, finding as aggravating factors that Lee had ten previous felony convictions, had committed the offenses for pecuniary gain, and had caused financial harm to the victims.

¶3 Under each cause number, Lee filed a notice of post-conviction relief pursuant to Rule 32. His appointed counsel filed notices pursuant to Rule 32.4(c)(2) stating she had reviewed the record and had found no colorable claims and requesting that Lee be granted an extension to file a supplemental brief. Lee then filed substantially identical pro se supplemental petitions in each case. He asserted the state had breached the plea agreements because he had not been transported to Maricopa County before sentencing. In the alternative, he argued his counsel had misled him into pleading guilty by telling him that the sentencing delay and transportation requirement were oral additions to the plea agreements. He also claimed his trial counsel had been ineffective in failing to seek dismissal in one of the cause numbers based on "speedy trial" violations

due to the delay between the offense and indictment. Finally, he asserted trial counsel had failed to provide him with a copy of the presentence report until the day before sentencing and had failed to ask for a continuance or request a presentence hearing when he made her aware of purported errors in the presentence report, including that it stated he had committed the offenses for pecuniary gain.

¶4 The trial court summarily denied relief after concluding that transportation to Maricopa County was not a condition of the written plea agreement, and Lee had affirmed at the change-of-plea hearing there were no promises extrinsic to the plea agreement. It also determined any claim based on speedy trial violations was meritless, and counsel therefore was not ineffective in failing to raise that claim. Regarding Lee's claims about the presentence report, the court determined Lee had been provided the report in ample time to raise any errors—and actually did raise several purported errors at sentencing. And the court concluded that, even absent the aggravating factor of pecuniary gain, it would have imposed the same sentences. Lee subsequently filed motions for rehearing, which the court denied as untimely.

¶5 Lee also filed additional petitions for post-conviction relief under each cause number, arguing his appointed Rule 32 counsel had been ineffective in failing to raise “all legal ground for relief sought by the defendant,” that his due process rights had been violated because he was not given access to his legal documents after he was transferred to Yavapai County during his Rule 32 proceedings, and that his motion for rehearing was, in fact, timely filed. The court, apparently treating those petitions as repetitive motions for rehearing, also denied them as untimely.

¶6 On review, Lee first argues the trial court erred in rejecting his claims related to the plea agreement. He asserts he believed the transportation requirement was part of the agreement because his counsel had told him it was part of the plea, and he would not have pled guilty had he known it was not part of the plea. To state a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below objectively reasonable standards and the deficient performance prejudiced him. *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). In this context, Lee must demonstrate he would not have pled guilty absent counsel's deficient performance and must provide an "allegation of specific facts which would allow a court to meaningfully assess why that deficiency was material to the plea decision." *State v. Bowers*, 192 Ariz. 419, ¶ 25, 966 P.2d 1023, 1029 (App. 1998).

¶7 The trial court did not expressly discuss this claim, but the court nonetheless did not err in implicitly rejecting it. Even assuming Lee believed, due to his counsel's conduct, that his transportation to Maricopa County to resolve a pending criminal matter was an enforceable provision of his plea agreement, Lee did not show resulting prejudice in the trial court. Although he asserts on review that he would not have entered the plea absent that term, he did not make that assertion below. He claimed only that the term was "a major inducement" to enter in to the plea. The mere fact the term may have been part of the inducement is insufficient to establish a colorable claim—he must show he would not have entered the plea absent that term. *See id.*

¶8 Moreover, based on Lee’s assertions, it is difficult to perceive how that term reasonably could be considered an inducement to plead guilty. Lee contends, as he did below, that the purpose of resolving the Maricopa County matter before sentencing was to obtain concurrent prison terms in the Pima County and Maricopa County proceedings and to avoid being prosecuted pursuant to a specialized program in Maricopa County “designed to prosecute repeat offenders with greater lengths of prison sentences.” But he has not pointed to any evidence suggesting his desired results would have been obtained. And his unsupported assertion that, absent his sentences being imposed in this matter, he would not have been prosecuted pursuant to the Maricopa repetitive offender program is patently incredible in light of his ten previous felony convictions.

¶9 For much the same reasons, we conclude the trial court did not err in rejecting Lee’s claim that the state had breached the plea agreement. First, nothing in the record supports Lee’s assertion the sentencing delay and transportation to Maricopa County were terms of the plea agreement; Lee’s oral motion to delay sentencing was separately addressed and ruled upon at the change-of-plea hearing. And, even assuming the delay in sentencing and transportation to Maricopa County were oral terms of the plea agreement, and the state breached the agreement because Lee was not transported, Lee has not shown manifest injustice requiring that the plea be rescinded. *See* Ariz. R. Crim. P. 17.5. As noted above, he has provided no evidence suggesting he was sentenced to a longer term in the Maricopa County matter as a result of his not having been transported there before his sentencing.

¶10 Lee next reasserts his claim that counsel was ineffective in failing to give him adequate time to review the presentence report and in failing to request a presentence hearing to address purported errors in that report. We find no error in the trial court’s rejection of his claim. In his petition, Lee identified none of the purported errors, but asserted in his reply that the presentence report incorrectly stated he had committed the offenses for pecuniary gain, that he was a “liar [and a] con,”¹ and that he previously had escaped police custody. But the court found only one of those facts relevant to sentencing; it aggravated Lee’s sentences in part because he had committed the offenses for pecuniary gain and it accepted Lee’s assertion that he had not escaped from custody. In summarily denying Lee’s claim, the court stated it would have imposed the same sentences absent the pecuniary gain factor. Thus, Lee’s claims based on the presentence report fail because he has not demonstrated prejudice.² See *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68 (failure to satisfy either part of *Strickland* fatal to ineffective assistance claim).

¶11 Lee also contends that his due process rights were denied because he was not given access to a law library or legal documents he had in his possession before being

¹The presentence reports contained a quote attributed to Lee’s mother from a 1993 presentence report, stating that she had “characterized [Lee] as ‘a liar and a con,’ noting he had stolen from her in the past.”

²Lee claimed in his motion for rehearing that, had there been a presentence hearing, he could have demonstrated that he did not have ten prior felony convictions, that the victims had suffered no financial harm, and that there were further mitigating factors. Although, as we discuss below, Lee’s motion for rehearing appears to have been filed timely, the trial court is not obligated to address issues raised for the first time in a motion for rehearing. See *State v. Ramirez*, 126 Ariz. 464, 467, 616 P.2d 924, 927 (App. 1980).

transferred to Yavapai County. *See Bounds v. Smith*, 430 U.S. 817, 828 (1977) (“[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.”). Lee raised this claim below in several motions to compel Yavapai County jail officials to provide those materials. The trial court denied those motions, stating Lee had not provided any detail about what documents he required or why he required them, and, in any event, it lacked jurisdiction to order the officials at the Yavapai jail to act.

¶12 Even assuming the trial court had such jurisdiction,³ we find no constitutional violation. As the court noted, Lee has not explained why the documents were needed beyond implying the materials might have been useful for legal research. Lee was appointed advisory counsel during his Rule 32 proceedings, and thus his lack of access to legal materials did not violate his constitutional right of access to the courts. *See State v. Murray*, 184 Ariz. 9, 28, 906 P.2d 542, 561 (1995). To the extent Lee argues his due process rights were violated after the court denied his petition and his advisory counsel’s responsibility ended, he never has explained what documents he required or how they were needed to adequately present his claims. Accordingly, Lee has not shown any resulting prejudice. *See State v. Clark*, 196 Ariz. 530, ¶ 47, 2 P.3d 89, 99 (App. 1999) (“[A] prisoner must demonstrate not only a denial of meaningful access [to a law

³The proper avenue for Lee to have sought relief would have been to file a petition for special action in Yavapai County. *See Bustamonte v. Ryan*, 175 Ariz. 327, 328, 856 P.2d 1205, 1206 (App. 1993).

library or to legal assistance] but also that the denial has actually injured his ability to present a meritorious argument to the court.”).

¶13 Finally, Lee asserts the trial court erred in determining his motions for rehearing and second petitions for post-conviction relief were untimely filed. Lee’s motions for rehearing were date stamped April 14, 2011, six days after the court had ordered they be filed. But both were dated April 6 on their last page, and Lee asserts he placed the motions in the prison mail system before April 8. If that is true, Lee’s motions for rehearing were timely filed. *See State v. Rosario*, 195 Ariz. 264, ¶ 10, 987 P.2d 226, 228 (App. 1999). But we need not remand for the court to make that determination. Lee’s motions either repeated the claims raised in his petitions or attempted to raise new claims. Thus, they did not comply with Rule 32.9(a), which requires Lee to have “set[] forth in detail the grounds wherein it is believed the court erred,” and the court did not err in denying Lee’s motions for rehearing. *See State v. Haight-Gyuro*, 218 Ariz. 356, n.5, 186 P.3d 33, 37 n.5 (App. 2008) (reviewing court may affirm trial court if correct for any reason supported by record); *State v. Ramirez*, 126 Ariz. 464, 467, 616 P.2d 924, 927 (App. 1980) (court need not address claims first raised in motion for rehearing).

¶14 Lee’s successive petitions for post-conviction relief, which the trial court apparently viewed as motions for rehearing, present a different question. For the most part, both motions merely sought review of the court’s previous rulings. Thus, with respect to those arguments, the court did not err in treating them as motions for rehearing. But Lee also raised a new claim that his Rule 32 counsel had been ineffective. *See State v. Petty*, 225 Ariz. 369, ¶¶ 9, 11, 238 P.3d 637, 640-41 (App. 2010) (claim of ineffective

assistance of Rule 32 counsel for pleading defendant raisable in successive petition). If the trial court deems this new claim to have been timely raised, Lee is entitled to have counsel appointed to evaluate and, if necessary, raise that claim in a petition for post-conviction relief.⁴ See *Osterkamp v. Browning*, 226 Ariz. 485, ¶ 20, 250 P.3d 551, 556-57 (App. 2011). Accordingly, the court lacked discretion to summarily dispose of those claims.

¶15 We grant review and remand the case to the trial court to appoint counsel regarding Lee’s claim of ineffective assistance of Rule 32 counsel. We otherwise deny relief.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

⁴Although Lee filed petitions for post-conviction relief, not notices, we do not find the distinction meaningful here—Lee clearly intended to raise a claim for which he is entitled to representation by counsel.